Supreme Court, U.S.
FILED
MAR 7 1996
CLERK

No. 95-591

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Alabama v. *King & Boozer*, 314 U.S. 1 (1941)	14
Brown v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827)	8, 12, 15
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)	13
City of Detroit v. *Murray Corp.*, 355 U.S. 489 (1958)	14
Collector v. *Day*, 78 U.S. (11 Wall.) 113 (1871)	14
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)	6
Cornell v. *Coyne*, 192 U.S. 418 (1904)	2, 4, 7-8, 10
Department of Revenue v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978)	5, 7
Fairbank v. *United States*, 181 U.S. 283 (1901)	4
Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1932)	13
Gillespie v. *Oklahoma*, 257 U.S. 501 (1922)	13
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)	13, 14
Graves v. *Texas Co.*, 298 U.S. 393 (1936)	14
Helvering v. *Mountain Producers Corp.*, 303 U.S. 376 (1938)	13
License Cases, 46 U.S. (5 How.) 504 (1847)	9
Limbach v. *Hooven & Allison Co.*, 466 U.S. 353 (1984)	6
Long v. *Rockwood*, 277 U.S. 142 (1928)	13
Low v. *Austin*, 80 U.S. (13 Wall.) 29 (1872)	9
Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976)	5, 7, 9, 10, 15, 16
New York ex rel. Rogers v. *Graves*, 299 U.S. 401 (1937)	13
Pace v. *Burgess*, 92 U.S. 372 (1876)	2
Panhandle Oil Co. v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928)	14
Peck & Co. v. *Lowe*, 247 U.S. 165 (1918)	2, 4, 7

Cases—Continued: Page

Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429 (1895) 14
Robbins v. *Shelby County Taxing District*, 120 U.S. 489 (1887) 6
South Carolina v. *Baker*, 485 U.S. 505 (1988) 14
Thames & Mersey Marine Ins. Co. v. *United States*, 237 U.S. 19 (1915) 2
Turpin v. *Burgess*, 117 U.S. 504 (1886) 2, 3, 4, 10, 12
United States v. *County of Allegheny*, 322 U.S. 174 (1944) 14
United States v. *City of Detroit*, 355 U.S. 466 (1958) 14
United States v. *Hvoslef*, 237 U.S. 1 (1915) 2, 6
United States v. *Township of Muskegon*, 355 U.S. 484 (1958) 14
Willcuts v. *Bunn*, 282 U.S. 216 (1931) 13

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 6
Art. I, § 9, Cl. 5 (Export Clause) ..... *passim*
Art. I, § 10, Cl. 2 (Import-Export Clause) 7, 8, 9, 10, 12
Internal Revenue Code, 26 U.S.C. 4371 ..... 1, 14, 15, 16
War Revenue Act of 1898, ch. 448, § 25 (Schedule A), 30 Stat. 459 ..... 4, 5

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 11
Justice Story's *Commentaries on the Constitution* (1833) (R. Rotunda and J. Nowak reprint, 1987, Carolina Academic Press) 11
Webster's Third New International Dictionary (Unabridged) (1986) 11

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-591

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

It is appropriate to emphasize at the outset the precise nature of respondent's claim in this case. Respondent does not dispute that the tax imposed by Section 4371 of the Internal Revenue Code may constitutionally apply to insurance obtained in connection with domestic shipments of goods. Instead, respondent claims only that this tax may not apply to insurance procured in connection with shipments of goods to foreign countries. If, for example, respondent ships cargo on a voyage from California to Alaska, with an intermediate stop in British Columbia, respondent asserts only that the insurance for the shipment offloaded in British Columbia—not the insurance for the shipment continuing on to Alaska

—is constitutionally exempt from the generally applicable federal tax.

Respondent's submission is thus grounded in the proposition that the Export Clause requires preferential, rather than nondiscriminatory, treatment of exports and the export process. No decision of this Court prior to *Hvoslef* and *Thames & Mersey* supports respondent's submission, and decisions both prior and subsequent to those cases contradict it.

1. a. Respondent errs in contending (Resp. Br. 9-26) that *United States* v. *Hvoslef*, 237 U.S. 1 (1915), and *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), are part of an unbroken line of authority supporting the view that generally applicable, nondiscriminatory taxes are invalid as applied to goods for export and export transactions. Decisions of this Court both before and after *Hvoslef* and *Thames & Mersey* hold that "a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition." *Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886). See also *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175 (1918); *Cornell* v. *Coyne*, 192 U.S. 418, 427-428 (1904).[1]

[1] The first two decisions of this Court under the Export Clause involved a federal tax on manufactured tobacco products. Tobacco intended for export was exempt from this tax, subject to the requirement that packages for export be identified by an engraved stamp costing 25 cents. *Pace* v. *Burgess*, 92 U.S. 372 (1876); *Turpin* v. *Burgess*, 117 U.S. 504 (1886). In each case, the plaintiffs sought a refund of amounts paid for the identifying stamps. In *Pace*, the Court concluded that the stamp requirement did not violate the Export Clause because it was not itself a tax but merely a device to prevent fraud and to deter untaxed tobacco products from entering the domestic economy. When Congress thereafter removed the charge for the identifying stamp in a statute that referred to it as an "export tax," Turpin brought suit to recover amounts he had paid. The Court rejected that claim, relying again on the analysis set forth in *Pace*. The Court in *Turpin* went on to say that, even if the charge for the stamp was a tax, it was "a general tax, laid on all property alike," rather than a specific tax on or related to exports. The Court concluded (117 U.S. at 507):

> Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained.

This conclusion is, of course, inconsistent with respondent's contention that an unbroken line of authority supports the holding in *Hvoslef* and *Thames & Mersey* that a nondiscriminatory tax may not be applied to goods for export.

Respondent claims that this passage from *Turpin* v. *Burgess* supports the proposition that even a nondiscriminatory tax "laid on all property alike" (117 U.S. at 507) is constitutionally barred from applying to "goods in course of exportation" (*ibid.*)—goods that have commenced what respondent refers to as the "export process" (Resp. Br. 20). It is axiomatic, however, that a tax that is "laid on all property alike" reaches, by definition, goods in the "export process." Goods in the export process are a subset of "all property." In the quoted passage from *Turpin* v. *Burgess*, the Court was distinguishing between taxes of general application, which the Export Clause does not proscribe, and taxes that are laid specifically, or discriminatorily, "on goods in course of exportation" or "because of their intended exportation" (117 U.S. at 507), which are unconstitutional. The Court made this clear by emphasizing in *Turpin* that, if the "same" tax applicable to domestic products had also

been applied to goods for export, the taxpayer "could not have complained" (*ibid.*). See also *Peck & Co.* v. *Lowe*, 247 U.S. at 175 (upholding a federal tax that applied without "discrimination" and that affected "exportation * * * only indirectly and remotely"); note 1, *supra*.

The Court reached this same conclusion in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), in upholding application of a general excise tax on "filled cheese" even as applied to such cheese produced specifically for export. *Id.* at 427. The Court explained that "[t]he constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State" and that "in both cases" it refers to duties imposed "by reason or because of" the exportation; it does not refer to "a general tax, laid on all property alike" (*ibid.*, quoting *Turpin* v. *Burgess*, 117 U.S. at 506). In so holding, the Court explained that the Export Clause does not relieve exports "from the prior ordinary burdens of taxation which rest upon all property similarly situated" (192 U.S. at 427).[2]

Respondent's suggestion that goods in the "export process" are to be relieved "from the prior ordinary burdens of taxation which rest upon all property similarly situated" is, in substance, a claim that a converse of the "original package" doctrine should

[2] The only other case decided under the Export Clause prior to *Hvoslef* and *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). In *Fairbank*, the Court held unconstitutional a stamp tax on bills of lading "for any goods, merchandise, or effects, to be exported from a port or place in the United States" (ch. 448, § 25 (Schedule A), 30 Stat. 459). By its terms, this tax was specifically on, and limited to, export transactions.

apply under the Export Clause. Under respondent's theory, when an article of commerce crosses an imaginary line representing the beginning of what respondent would view as the "export process," an *absolute* immunity from general taxes for that good *and* for any handling of that good (*and* for any insurance upon the handling of that good) arises under the Export Clause. But this Court rejected precisely that type of formalistic reasoning in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 298 (1976), in concluding that a tax imposed on imported articles in their "original package" is constitutionally permissible if the tax does not treat "imported goods * * * differently from the 'common mass of property in the country' * * *." See also *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (upholding application of a nondiscriminatory state tax to revenues from stevedoring services rendered in the "process" of importing and exporting goods). A nondiscriminatory federal tax that does not treat "[exported] goods * * * differently from the 'common mass of property in the country'" is similarly constitutional. See Pet. Br. 32-37.

b. The 1915 decisions in *Hvoslef* and *Thames & Mersey* involved stamp taxes imposed by the War Revenue Act of 1898. *Hvoslef* involved a stamp tax on any "contract or agreement for the charter of any ship" without reference to the destination or area of operation of the ship. *Thames & Mersey* involved a stamp tax on policies of marine insurance "whether covering peril by sea or on inland waters." The challenged taxes thus applied without discrimination to both domestic and foreign commerce. Falling on all property alike, the taxes were of the type that this

Court had concluded should be sustained in *Cornell* and *Turpin*.

In *Hvoslef* and *Thames & Mersey*, however, the Court relied on the rationale of *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887), for the proposition that even nondiscriminatory taxes may not constitutionally be applied to exports or to export transactions.[3] See 237 U.S. at 18. In *Robbins*, the Court had held that the Commerce Clause precludes application of general, nondiscriminatory state taxes to interstate commerce. In *Hvoslef*, the Court stated that it knew "of no ground upon which" the treatment afforded to nondiscriminatory state taxes under the Commerce Clause should differ from the treatment to be afforded to nondiscriminatory federal taxes under the Export Clause. 237 U.S. at 18.

The reasoning that the Court applied in *Robbins*, of course, was subsequently "*repudiated*" by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). See *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); Pet. Br. 29-30. Aside from the rationale of *Robbins*, which has now been repudiated, there was and is no authority for the conclusion reached by the Court in *Hvoslef* and *Thames & Mersey*.

c. Respondent suggests (Resp. Br. 23) that the tenuous line of authority in which it asserts *Hvoslef*

---

[3] In *Hvoslef*, the Court also relied on *Fairbank* v. *United States*, *supra*, for the proposition that a tax on bills of lading is equivalent to a tax on the article exported. 237 U.S. at 14-15. But *Fairbank* involved a discriminatory tax that applied *only* to exported goods (see note 2, *supra*) and *Hvoslef* did not. In *Hvoslef*, the Court therefore relied exclusively on *Robbins* as support for its holding that a nondiscriminatory tax may not constitutionally be applied to goods for export. 237 U.S. at 18.

and *Thames & Mersey* are located extends to *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918). In that case, the Court, after reviewing each of the earlier cases involving the Export Clause, upheld the application of the federal income tax to income from export sales. The Court noted that the income tax is on net income, rather than on gross export sales. The more fundamental rationale for that decision, however, is found in the Court's observation that the income tax is a general tax, "not laid on income from exportation because of its source, or in a discriminatory way, but just as it is laid on other income." See Pet. Br. 25-26 & n. 9. The Court emphasized in *Peck & Co.* that the tax involved "no discrimination" and that, "[a]t most, exportation is affected only indirectly and remotely." 247 U.S. at 175. That same rationale sustains the nondiscriminatory tax challenged in this case.

d. Finally, the unbroken line of authority proclaimed by respondent assuredly does not include this Court's most recent decisions dealing with the subject. In *Michelin Tire Corp.* v. *Wages*, the Court noted that its decisions had made "crystal clear" that the Import-Export Clause does not bar application of nondiscriminatory state taxes to imports—whether in the "original package" or not. 423 U.S. at 300. And, in *Washington Stevedoring*, the Court applied that same reasoning in upholding the application of nondiscriminatory state taxes to the handling of goods for export (an aspect of what respondent terms the "export process" (Resp. Br. 20)). 435 U.S. at 757-758.

This Court has often emphasized that "[t]he constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State." *Cornell* v.

Coyne, 192 U.S. at 427. Although there is "some diversity in language" between the Export and Import-Export Clauses, "none is perceivable in the act which is prohibited." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827). As we explain in detail in our opening brief (Pet. Br. 32-37), the same reasons that led this Court to uphold the application of nondiscriminatory state taxes to the "export process" under the Import-Export Clause require that similarly nondiscriminatory federal taxes be upheld under the Export Clause. Indeed, it would be decidedly contrary to the overall scheme of the Constitution to hold that in this one area the States have *greater* discretion than the federal government to enact laws affecting foreign commerce. See Pet. Br. 36.

2. Respondent seeks to minimize the significance of *Michelin Tire Corp.* and *Washington Stevedoring* by magnifying the difference in phrasing of the Export Clause and the Import-Export Clause. The former specifies that "No Tax or Duty shall be laid on Articles Exported" (U.S. Const. Art. I, § 9, Cl. 5); the latter provides that "No State shall * * * lay any Imposts or Duties on Imports or Exports" (U.S. Const. Art. I, § 10, Cl. 2). Respondent contends that the analysis applied by this Court in *Michelin Tire Corp.* and *Washington Stevedoring* is inapplicable to cases involving the Export Clause because the "absence of a prohibition on 'taxes' in the Import/Export Clause was central to the" Court's decisions in those cases (Resp. Br. 32). There are two answers to respondent's contention: (i) it misdescribes the Court's opinions and (ii) it is based on a misunderstanding of the words employed in these constitutional Clauses.

a. In *Michelin Tire Corp.*, the Court held that a "nondiscriminatory" tax on imported goods located within a State is not unconstitutional and that the Court had erred 100 years earlier when it ruled to the contrary in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). The Court made that point at the outset of its opinion (423 U.S. at 279), explained that nondiscriminatory taxes of general application do not offend the objectives of the Import-Export Clause (*id.* at 283-290), noted that a nondiscriminatory general tax does not clearly represent an "impost" or "duty" laid on imports or exports (*id.* at 291-292), and "decline[d] to presume [the Clause] was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (*id.* at 293-294). The Court explained that, as long ago as its 1847 opinion in the *License Cases*, 46 U.S. (5 How.) 504, the Court had made "crystal clear" that nondiscriminatory taxes do not offend the Constitution, which proscribes only "exactions upon imports *as imports*" (423 U.S. at 300). The Court's decision in *Low* v. *Austin*, which had held to the contrary, was therefore overruled (*id.* at 279).

The "central" point of *Michelin* is thus twofold. First, that the Import-Export Clause is designed to proscribe only "exactions upon imports *as imports*" (and upon "exports *as exports*"); and second, that the text of that Clause should not be read to proscribe exactions that do not offend that purpose.

That same analysis applies to the Export Clause. The text of the Export Clause proscribes only taxes "laid on Articles exported." As we explain in detail in our opening brief (Pet. Br. 32-37), the limited purposes of the Export Clause, as well as its narrow text, reflect that it is designed to proscribe only exactions

upon exports *as exports*. A nondiscriminatory tax that falls on "all goods alike" is not an exaction upon exports *as exports* and should therefore be sustained. See, *e.g.*, *Cornell* v. *Coyne*, 192 U.S. at 428; *Turpin* v. *Burgess*, 117 U.S. at 507. See also *Michelin Tire Corp.* v. *Wages*, 423 U.S. at 300.

Particularly at a time when export trade increasingly represents a growing portion of our Nation's commerce, it is inappropriate to disregard the limited purpose and narrow text of the Export Clause to provide an absolute immunity for the "export process," as respondent urges. By providing an immunity from taxation upon exports *as exports*, the Constitution does not preclude generally applicable taxes that fall on all goods alike. As this Court has emphasized, the Constitution does not shield articles of export from the same "ordinary burdens of taxation" that also apply to domestic commerce. *Cornell* v. *Coyne*, 192 U.S. at 427.

b. Respondent's contention that the Export Clause prohibits application of nondiscriminatory taxes to the "export process"—even though the Import-Export Clause concededly does not—is grounded on respondent's assertion that the phrase "impost or duty" in the Import-Export Clause is conceptually distinct from the phrase "tax or duty" in the Export Clause. That contention is not correct.

The English language is rich with synonyms. One result of the Norman Conquest, and of the waves of earlier and later commercial and political interaction with the Continent, is that there are innumerable examples in English usage of words that have different origins but indistinct or overlapping meanings. This is particularly so with respect to governmental functions: a lawyer and an attorney, a sheriff and a

marshal, an earl and a duke, are examples. A more relevant example is a "tax" and an "impost." The word "impost" comes from Middle French and is derived from the Medieval Latin "impositum." These terms signify an "imposition." See *Webster's Third New International Dictionary (Unabridged)* 1136 (1986). In usage, an "impost" is a governmental form of imposition: it is "something imposed or levied: TAX, TRIBUTE, DUTY." *Ibid.*

As its derivation and usage reflects, there is no fixed distinction between an "impost" and a "tax." These are words of separate origin that describe an undifferentiated and overlapping concept. For example, *Black's Law Dictionary* 756 (6th ed. 1990) defines the word "imposts" as "Taxes, duties, or impositions levied for divers reasons. * * * Generic term for taxes." Authority more nearly contemporaneous with the adoption of the Constitution also states (Justice Story's *Commentaries on the Constitution* § 472, at 337 (1833) (R. Rotunda and J. Nowak reprint, Carolina Academic Press 1987)):

> In a general sense, all contributions imposed by the government upon individuals for service of the state, are called taxes, by whatever name they may be known, whether by the name of tribute, tythe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.

Justice Story observed that the word "imposts" is (*id.* § 474, at 339):

> sometimes used in the large sense of taxes, or duties, or impositions, and sometimes in the more restrained sense of a duty on imported goods and merchandise.

Brown v. *Maryland*, which was the Court's first decision under the Import-Export Clause, was a contest over this issue of usage or meaning. Chief Justice Marshall announced near the outset of the opinion that "[t]he counsel for the state of Maryland would confine this prohibition [of imposts and duties on imports and exports] to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope." 25 U.S. (12 Wheat.) at 437. The Court then considered, in a number of contexts, the results of each view, and consistently found support for the broader view. The Court concluded that the term "impost" is not used in a narrow or fixed manner, but generally signifies a "tax levied on articles brought into a country" (*ibid.*). That explanation of the term, of course, parallels the text of the Export Clause, which prohibits any "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). It was in that context that Chief Justice Marshall explained that the terms of the Import-Export Clause and the Export Clause are not distinguishable in meaning: "There is some diversity in language, but none is perceivable in the act which is prohibited." 25 U.S. (12 Wheat.) at 445. In *Turpin* v. *Burgess*, 117 U.S. at 506, the Court similarly concluded that "the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State."

As this Court has firmly concluded, there is no textual basis to differentiate "the constitutional prohibition against taxing exports" set out in these two Clauses. And, as we have previously shown (Pet. Br. 32-37), the limited purposes of the Export and Import-Export Clauses compel this same conclusion. For the

same reasons that a generally applicable, nondiscriminatory state tax may constitutionally be applied to goods for export and to the "export process," the generally applicable, nondiscriminatory federal tax involved in this case should also be upheld.[4]

---

[4] In addition to *Michelin*, *Washington Stevedoring*, and *Complete Auto*, the Court has issued numerous decisions that overruled older precedent that, in a variety of constitutional contexts, had upheld claims for immunity from generally applicable, nondiscriminatory taxes. As Chief Justice Hughes noted in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 385 (1938), quoting *Willcuts* v. *Bunn*, 282 U.S. 216, 225 (1931):

> In numerous decisions we have had occasion to declare * * * that the power to tax should not be crippled "by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws * * *."

(a) In *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932), the Court upheld a state business tax on gross receipts as applied to royalties from copyrights. The Court "definitely overruled" *Long* v. *Rockwood*, 277 U.S. 142 (1928), which had held that a state income tax could not constitutionally be applied to royalties paid for the use of patents issued by the United States. 286 U.S. at 131.

(b) In *Helvering* v. *Mountain Producers Corp.*, 303 U.S. at 385, the Court upheld application of the federal income tax to income received by a private taxpayer from an oil lease of state-owned land. In so holding, the Court overruled *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), which had held that Oklahoma could not constitutionally apply its income tax to the income of a lessee of restricted Indian lands, and overruled *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), which had held that the federal income tax could not be applied to the income derived by a lessee of lands owned by a State. See 303 U.S. at 387.

(c) In *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939), the Court overruled *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401 (1937), which had held that a state income tax

3. Accepting for purposes of argument that the constitutional reasoning of *Michelin Tire Corp.* and *Washington Stevedoring* is fully applicable under the Export Clause, respondent asserts that the nondiscriminatory tax imposed by Section 4371 is nonetheless unconstitutional as applied to insurance for foreign shipments of export goods. Respondent claims that factual differences make *Michelin Tire*

---

could not be applied to the salary of an employee of a federal instrumentality, and also overruled *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), which had held the salary of state judges to be immune from the federal income tax. 306 U.S. at 486.

(d) In *Alabama* v. *King & Boozer*, 314 U.S. 1, 9 (1941), the Court held that the Constitution did not preclude application of state sales taxes to purchases of building materials by a contractor performing a cost-plus contract for the United States. In so holding, the Court overruled *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), and *Graves* v. *Texas Co.*, 298 U.S. 393 (1936).

(e) In *United States* v. *City of Detroit*, 355 U.S. 466 (1958), *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958), and *City of Detroit* v. *Murray Corp*, 355 U.S. 489 (1958), the Court upheld the application of Michigan property and use taxes against industrial taxpayers who leased and occupied real property owned by the United States in the performance of supply contracts with the United States. In each case, the United States unsuccessfully invoked *United States* v. *County of Allegheny*, 322 U.S. 174 (1944), which had held that a government contractor could not constitutionally be liable for a state property tax on machinery owned by the United States.

(f) In *South Carolina* v. *Baker*, 485 U.S. 505, 524 (1988), the Court held that interest on bonds issued by States and their political subdivisions is exempt from the federal income tax only by virtue of the statutory provisions of the Internal Revenue Code and not because of any constitutional requirement. In so holding, the Court overruled *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429 (1895).

Corp. and *Washington Stevedoring* "distinguishable" from the present case (Resp. Br. 42).

a. Respondent claims that *Washington Stevedoring* is inapposite because the cost of stevedoring services, unlike the cost of insurance, has no economic relation to the value of the exported goods (Resp. Br. 43). That alleged distinction, however, totally ignores the facts and holding of *Michelin Tire Corp.*. The nondiscriminatory *ad valorem* property tax that the Court upheld in *Michelin* was, of course, directly related to the value of the imported goods. It is the very nature of an *ad valorem* tax for the amount of the tax to be related to the value of the property. The relationship between the value of the goods and the challenged tax in *Michelin* was thus unquestionably more direct than in the present case, for the cost of the casualty insurance taxed under Section 4371 of the Internal Revenue Code varies not only with the value of the goods but also with the nature, duration and destination of the shipment.

b. Respondent claims that *Michelin Tire Corp.* is inapposite because the imported goods taxed in that case "were no longer in transit" (Resp. Br. 42). In making that contention, respondent ignores what is perhaps the most essential feature of the Court's decision in that case. As the Court emphasized in *Michelin*, the fact that goods remain in transit and have not yet been "so mingle[d] * * * with the common property within the State as to 'lose their distinctive character as imports' * * * did not mean that * * * no exaction could be imposed on the goods." 423 U.S. at 298, paraphrasing *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 441-442. The Court held that a State does not violate the Constitution by taxing property, whether imported or domestic, "in a

manner that [does] not depend on the foreign origins of the goods." 423 U.S. at 298. Respondent's claim of a factual distinction based upon the fact that the goods in this case are "in transit" also ignores that the imported and exported goods for which stevedoring services were provided—and taxed—in *Washington Stevedoring* were unquestionably "in transit." The essential task of stevedoring, of course, is to assist the "transit" of goods.

c. The purported factual distinctions on which respondent relies in its effort to distinguish this case from *Michelin* and *Washington Stevedoring* thus simply do not exist. Because the reasoning of *Michelin* and *Washington Stevedoring* is equally applicable to the Export Clause, and because the nondiscriminatory tax imposed by Section 4371 is not imposed directly or specifically on exports *as exports*, the federal tax challenged in this case should be sustained.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1996